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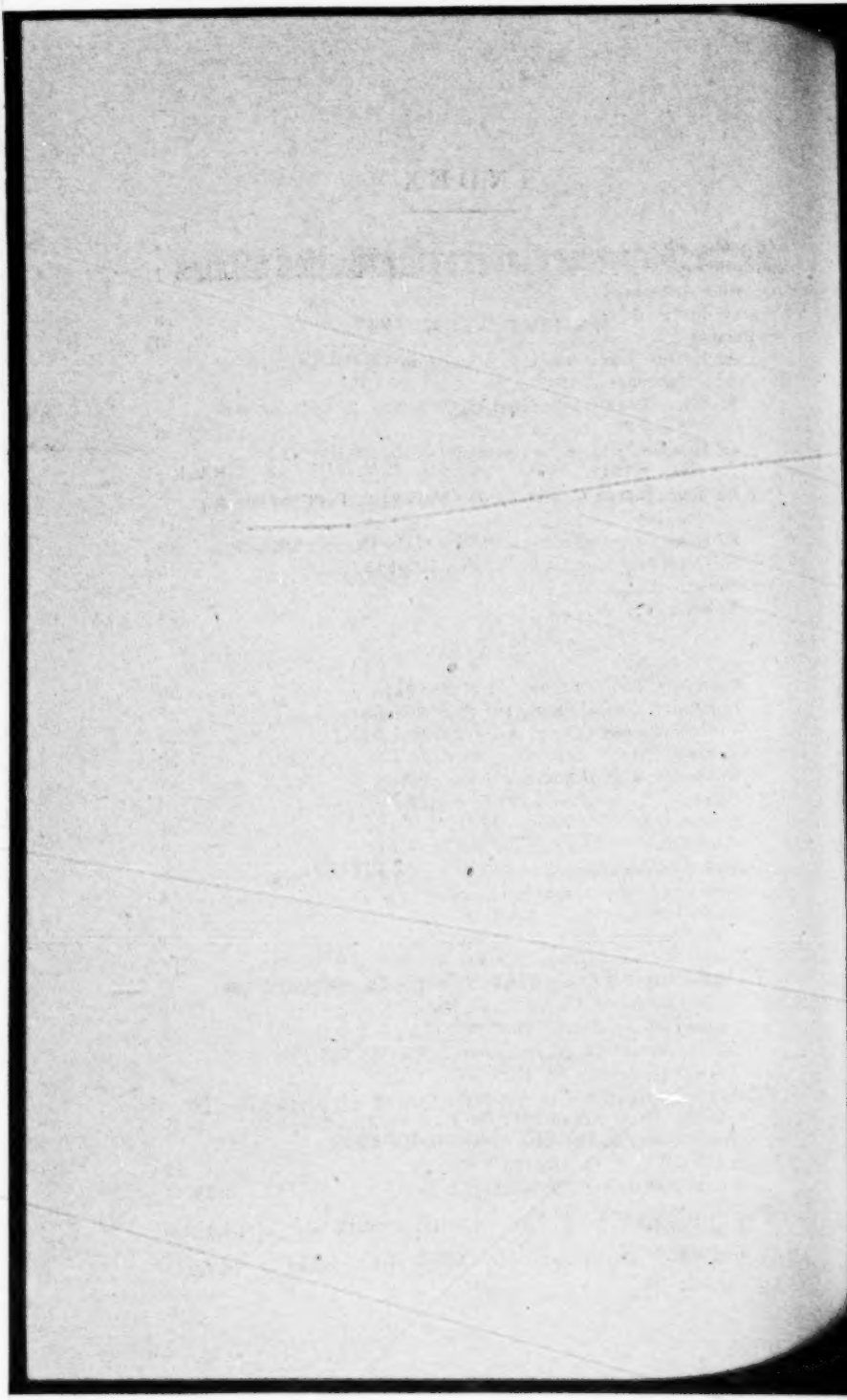

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 647

SERGE M. RUBINSTEIN, ALSO KNOWN AS SERGE MANUEL RUBINSTEIN DE ROVELLO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 648

ALLEN GORDON FOSTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions in the circuit court of appeals (R. 2227–2240) have not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered February 5, 1948 (R. 2241). The

petitions for writs of certiorari were filed March 5, 1948. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether false statements in support of a claim for occupational deferments are false statements as to liability for service within the purview of Section 11 of the Selective Training and Service Act.

2. Whether deliberately false statements as to the importance of a registrant to a business fail to come within the purview of Section 11 because they involve matters of opinion.

3. Whether the evidence is sufficient to support the verdict.

4. Whether, after instructing the jury as to the nature of the offense charged in the indictment, the judge was required to give instructions to the jury not to base its verdict on other evidence.

5. As to petitioner Rubinstein (No. 647), whether he could be separately punished for being a party to the making of a false statement by the employer and for conspiracy to make such false statement.

STATUTE INVOLVED

Section 11 of the Selective Training and Service Act of 1940, c. 720, 54 Stat. 885, 894–895 (50 U. S. C. App., 311), provides in pertinent part:

> * * * any person who shall knowingly make, or be a party to the making of, any false statement or certificate as to the fitness or unfitness or liability or nonliability of himself or any other person for service under the provisions of this Act, or rules, regulations, or directions made pursuant thereto, or who otherwise evades registration or service in the land or naval forces or any of the requirements of this Act, or who knowingly counsels, aids, or abets another to evade registration or service in the land or naval forces or any of the requirements of this Act, or of said rules, regulations, or directions, * * * shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, * * *

STATEMENT

An indictment in five counts charging the making of false statements as to the liability of petitioner Rubinstein for service under the Selective Training and Service Act was returned in the United States District Court for the Southern District of New York (R. 2219–2226). The first count against Rubinstein alone is not presently

involved, since his conviction on that count was reversed on appeal (R. 2238). The second count charged that petitioners, Rubinstein and Foster, submitted false statements to the Selective Service Board in that they submitted an affidavit seeking an occupational deferment for Rubinstein which contained knowingly false statements to the effect that the successful operation of Panhandle Producing and Refining Company, Midway Victory Oil Company, and Panhandle Steel Products Company depended upon the continuance of Rubinstein's employment by those companies, and that loss of his services would seriously impair the drilling program and other activities of the companies (R. 2220–2221). The third count charged a conspiracy to commit the offense charged in the second count (R. 2222–2223). The fourth count charged that Rubinstein and defendant Hart made false statements in an affidavit for occupational deferment to the effect that Rubinstein was executive assistant to the president of Taylorcraft Aviation Corporation and had been employed by that corporation since August 2, 1943 (R. 2223–2224). The fifth count charged a conspiracy to commit the offense charged in the fourth count (R. 2224–2225).

Rubinstein was convicted on all counts and he was sentenced to imprisonment for a period of 2½ years and to pay a fine of $10,000 on each, the prison sentences to run concurrently (R. 2182, 2190–2191). Foster was convicted on counts 2

and 3 and sentenced to imprisonment for two years and to pay a fine of $5,000 on each; execution of the imprisonment sentences was suspended and he was placed on probation for five years (R. 2182, 2192). Hart was convicted on counts 4 and 5 (R. 2182) but did not appeal.

The evidence for the Government may be summarized as follows:

A. *Events preceding the submission of the affidavit of February 2, 1943.*—Rubinstein, a national of Portugal, registered with his local draft board under the Selective Training and Service Act (Ex. 2, R. 10). On March 3, 1942, he was placed in Class III–A, the classification for persons deferred because of dependents (R. 13–14). On November 19, 1942, Rubinstein submitted an occupational questionnaire in which he stated that he was chief executive officer of Midway Victory Oil Company, a corporation which had "working control" of Panhandle Producing and Refining Company and Panhandle Steel Products Company (Ex. 11, R. 19). There was also submitted an affidavit by Foster and one Duffy to the effect that Rubinstein's full time was devoted to the affairs of the companies mentioned and that his duties were the direction and management of the companies (Ex. 12, R. 19).[1] On November 25,

[1] Foster, an interior decorator, was a director of several companies in which Rubinstein was interested, including Midway Victory Oil Company and Panhandle Producing and Refining Company (R. 356). Duffy was a director of Panhandle Producing and Refining Company (R. 360).

1942, Rubinstein was classified in Class II–B, i. e., he was given an occupational deferment (Ex. 21, R. 20).

B. *The affidavit submitted on February 2, 1943 (counts 2 and 3).*—Some time after November 25, 1942, Rubinstein was placed in Class I–A, the classification for persons liable for immediate induction, and thereafter he requested a hearing before the board on that classification (R. 21–22). He appeared before the board on February 2, 1943, and submitted a number of documents (R. 24–25). Among them was Form 42A, an employer's affidavit for occupational deferment, sworn to by Foster as a director and officer of Midway Victory Oil Company and Panhandle Producing and Refining Company and as an officer of Panhandle Steel Products Company (Ex. 15A, R. 25). The affidavit stated that Rubinstein's "duties actually performed" consisted of direction of drilling operations, sale of crude and other products, negotiations for obtaining subcontracting work for shipyards, negotiations with the petroleum coordinator, and directions for negotiations of contracts for the steel plant with various government departments. It also stated that the companies were engaged in 100 percent war work. In answer to the question as to how long it would take to replace the employee, the affidavit stated that "because of the character of employee's functions the successful continuance

of operations depends upon employee remaining with the company." The affidavit further stated that it was impossible to replace Rubinstein "without seriously impairing drilling program and otherwise hampering the Companies' activities." Counts 2 and 3 are based upon these latter statements.

Duffy, a director of Panhandle Producing and Refining Company, testified that during the evening of February 2, 1943, while Foster was in his office, Rubinstein's secretary brought him a number of papers, including the Form 42A already completed (R. 357, 359, 407). Duffy started to read the form, but Rubinstein came in and took it from him and gave it to Foster (R. 357). Foster said that he wanted to read the form, but Rubinstein said that it was not necessary to do so, that Foster could sign it and Rubinstein would explain it on the way uptown (R. 357). As presented to the draft board later that evening, the form was sworn to by Foster (Ex. 15A, R. 25).

C. *Evidence relating to the falsity of the affidavit of February 2, 1943.*—Panhandle Producing and Refining Company was a holding company which did not itself engage in the production of oil and steel products (R. 360–361, 416–417). Its operating subsidiaries were located at Wichita Falls, Texas, and all activities of those companies were carried on in Texas (R. 417, 435, 506–507). The minute books and all the records

of the parent company, as well as of the subsidiaries, were kept in Wichita Falls until January 1, 1944 (R. 533). No Form 42A had been executed outside of Texas for anyone connected with the Panhandle companies except that which Rubinstein submitted to his draft board (R. 533).

Petitioner Foster had not been at the Panhandle properties in Texas (R. 532–533). None of the companies' names appeared on the door of Rubinstein's suite in New York until after February 2, 1943 (R. 533–534). Rubinstein had been in Wichita Falls only twice prior to February 2, 1943. He was there for two days in August 1942, but did not go out to the oil wells (R. 512, 538). He was there for part of one day in September when he sought unsuccessfully to have himself elected president of Panhandle Refining Company, the oil producing subsidiary (R. 512–514). Rubinstein was not an officer of Panhandle Refining Company, but only of the parent holding company (R. 513–514). He was merely a director of the subsidiary (R. 514).

The Panhandle companies had been operating for many years before Rubinstein became associated with them (R. 506). Roy B. Jones had founded the companies and was president and general manager of Panhandle Refining Company and president of Panhandle Steel Products Company (R. 506, 515). Next under him was Stanford, vice president (R. 515). Although Rubinstein became president of the Panhandle

Steel Products Company in November 1942, Jones continued active to the same extent as before in both the refining and steel products companies and continued to receive the same compensation (R. 523, 586). Rubinstein received no additional compensation as president (R. 524).

Each of the various departments of the refining company was headed by a competent person of long experience and up to February 2, 1943, Rubinstein had done absolutely nothing for any department (R. 515–521), except speak briefly about one account (R. 520). Rubinstein was never manager of field operations and did nothing by way of directing the operations of Panhandle Producing and Refining Company or any other Panhandle company in the field (R. 527). Rubinstein himself had one Stzykgold made manager of field operations (R. 521) and directed that operations be subject to the joint agreement of Stzykgold and Stanford (R. 526).

As to Panhandle Steel Products Company, Rubinstein had been at its plant only once for less than an hour in the period before February 2, 1943 (R. 431–432, 492, 502). All of the manufacturing and business operations of that company were supervised by the witness Helmcamp (R. 494–495), who, as vice-president, general manager and director (R. 428), secured and filled orders, purchased raw materials and distributed them, directed its personnel and determined their wages and salaries, and was entirely responsible for all

of its operations, activities and production generally (R. 494–497). All of the company's employees reported to Helmcamp alone (R. 430) and all of the company's business was conducted at Wichita Falls (R. 496).

On questions of policy, Helmcamp consulted only Jones, Stanford, and the directors resident at Wichita Falls, not Rubinstein (R. 430–431, 491–492), even after Rubinstein became president of the company (R. 492–493). All directors' meetings were held at Wichita Falls (R. 435–436), and up to February 2, 1943, Helmcamp made no reports of any sort to Rubinstein (R. 439, 472), reporting only to Jones and Stanford (R. 492–493); nor did he receive any orders, instructions, or advice from Rubinstein (R. 491, 496–497).

As to Midway Victory Oil Company, it was for the most part merely a corporate entity through which Rubinstein purchased and sold securities (R. 366). Four employees were sufficient to conduct its oil business in Texas (R. 365–366, 1094–1095). Such drilling as was conducted was in charge of one Cassidy (R. 423–424).

Rubinstein did not devote full time to the affairs of the Panhandle companies. In December 1942, he wrote to a fellow director of the parent Panhandle company as follows (Ex. 79, R. 634):

> The Directors have appointed me president [of the parent company], which post I have accepted with the understanding that until such time as I am able to devote more

> time to the company's operations I will receive only $300 a month in lieu of my Executive Committee fees of $225.

Similarly, on two or three occasions in 1943, Rubinstein told a Panhandle officer that he hoped his own personal affairs would soon be cleaned up, so that he could devote more time to those of Panhandle (R. 643, 670–672). In May 1942, Rubinstein had obtained permission from his draft board to go to Chile for six months to attend to his own financial affairs (Exs. 9, 10, R. 16–17).

In the affidavit submitted by Foster, it was stated that the Panhandle companies were engaged 100 percent in war work (Ex. 15A, R. 25). In fact, however, only about 30 to 50 percent of the refining company's products were used in the war effort (R. 527–528, 573–575, 578), and only about half of the steel products company's output was so used (R. 434, 480).

D. *The affidavit submitted on October 12, 1943 (counts 4 and 5).*—On the basis of the documents submitted on February 2, 1943, Rubinstein was classified II–B (R. 29). An appeal was taken by the City Director of Selective Service and the appeal board placed him in Class I–A (R. 29). On September 7, 1943, however, the local board reopened Rubinstein's classification and reclassified him II–B (R. 41). An appeal was again

taken and Rubinstein was again classified I–A (R. 41–42). He was notified of that action on October 2, and on October 8 he was ordered to report for induction on October 20 (R. 41–42, 44–45). On October 12, Rubinstein asked for another hearing and on that day he presented to the board a form 42A, signed by Hart, to the effect that Rubinstein was executive assistant to the president of Taylorcraft Aviation Corporation, that he was in charge of financial and administrative matters for the company, and that he had been employed in such capacity since August 2, 1943 (R. 46–47; Exs. 25 and 26, R. 47). Counts 4 and 5 are based upon these statements.

E. *Evidence relating to the falsity of the October affidavit.*—On October 4, two days after Rubinstein had been notified that he had been placed in Class I–A, he proposed that Panhandle Producing and Refining Company invest in Taylorcraft Aviation Corporation, but his suggestion was disapproved (Ex. 65, R. 368–369). On October 7, Rubinstein met Hart and one Buckley, both Taylorcraft directors, in New York (R. 1170). Hart and Buckley had been placed in charge of Taylorcraft by one Baker and his associates (R. 1794, 1819). Baker and his associates were negotiating for the sale of their stock in Taylorcraft and had received an offer from prospective purchasers who desired to merge Taylorcraft with their own company (R. 688,

690, 694, 1757–1758, 1794–1977), thus threatening Hart's position as president.

On October 9, Rubinstein flew with Buckley to Alliance, Ohio, where the Taylorcraft plant was located (R. 1989). On Sunday, October 10, Hart had the personnel director of Taylorcraft come to the plant (R. 699, 713–715). Hart introduced Rubinstein to the personnel director and stated that Rubinstein was to go on the Taylorcraft payroll as Hart's executive assistant, and that on approval of the board of directors, Rubinstein was to be vice president in charge of finances. He also stated that he wanted Rubinstein's name added to the Taylorcraft replacement list which was to be filed with Ohio selective service headquarters the following day. (R. 714–715.) At Hart's request, the personnel director brought him three blank forms 42A, and Hart and Rubinstein then went into Hart's office (R. 715–716). When they emerged, Hart handed the personnel director a form filled out in pencil, not in Hart's handwriting (R. 716). Mrs. Hart typed two copies of the form, which were signed and sworn to that Sunday morning (R. 716–718). One copy was left with Hart and the other copy was taken by Rubinstein (R. 729, 734).

Upon his return to New York, Rubinstein gave his secretary a purported letter of employment by Taylorcraft dated August 2, 1943, and instructed her to have it photostated and filed (R. 793–794;

Ex. 95, R. 744).[2] Rubinstein also directed that the legend, "Taylorcraft Aviation Corporation, New York Representative," be placed on the door of his suite of offices (R. 796–797).

On October 11, the personnel officer revised the replacement schedule of Taylorcraft to include Rubinstein's name and took it by plane to state selective service headquarters at Columbus, Ohio (R. 723, 727). When he returned, Hart stamped the copy of the form 42A which he had retained to indicate that the schedule had been accepted and sent it immediately to Rubinstein (R. 728–730).

On the same day in New York, at a meeting of the directors of Panhandle, Rubinstein, by personally guaranteeing Panhandle against loss, arranged for a loan by Panhandle to a holding company owned by Hart and Buckley (R. 373–374, 646–647).

Rubinstein's name did not appear on the Taylorcraft payroll register for any of the payroll periods prior to October 12, 1943 (R. 708–712). After December 14, entries were made showing compensation to Rubinstein for the period from August 2 to November 16, 1943 (R. 752). Neither the secretary of the company nor a director familiar with its financial affairs had any knowledge

[2] The letter was admittedly typed by Mrs. Hart at Taylorcraft's plant (R. 1766–1767). Mrs. Hart was at the plant on October 10, 1943 (R. 714). On August 2, 1943, Mrs. Hart was pregnant and she gave birth to a child a few days later (R. 745, 1767).

of any connection of any sort between Rubinstein and Taylorcraft (R. 687–688, 765–767; see also R. 752). In an affidavit submitted to the draft board on August 12, 1943, giving the personal history statement required of aliens, Rubinstein made no mention of any employment by Taylorcraft (Gov. Ex. 21, R. 37–40).

F. *Events subsequent to October 12, 1943.*—The local board refused to change Rubinstein's reclassification, and he was ordered to report for induction (R. 56). Thereafter he filed form 301, claiming exemption from service as the subject of a neutral country (R. 56–58).

ARGUMENT

1. Petitioners contend (No. 647, Pet. 6, 7, 11–18; No. 648, Pet. 4, 5–6, 9–16) that it was not a criminal offense to make a false statement to a local draft board with a view to obtaining a deferment from military service. They concede that the making of a false statement for the purpose of securing an exempt classification, as distinguished from a deferred one, was a violation of the third clause of Section 11 of the Selective Training and Service Act of 1940. That clause provided for the punishment of any person—

> who shall knowingly make, or be a party to the making of, any false statement or certificate as to the fitness or unfitness or liability or nonliability of himself or any other person for service under the pro-

> visions of this Act, or rules, regulations, or directions made pursuant thereto * * *.

Petitioners' theory is that "liability for service" related only to the question whether a registrant was totally exempt from service under the Act, and that a false statement which did not seek to establish total exemption from service was not one in respect of the registrant's liability for service under the Act. Nothing except an extremely narrow reading of the word "liable" supports this view, and no court has read the word that narrowly. This Court denied a petition for a writ of certiorari which made, among others, the same argument. *Peskoe* v. *United States,* No. 874, October Term, 1946, 330 U. S. 824.

There is no basis, in our view, for distinguishing between a false statement directed to an exemption and one related to a deferred classification. When a local board classified a registrant in an exempt classification, it determined that he was not at any time liable for service under the Act. On the other hand, when the board determined that a registrant should be placed in a deferred classification, it determined that at that time he was not liable for service. In contrast to the exempt status, a deferred classification meant that the registrant was not then liable for selection for service, but that at any time in the future, if his situation changed or if the regulations establishing deferred categories were

amended, his classification might then be changed to I–A, and he would then become liable for selection for military service. The sole difference between an exemption and a deferment was the difference between being totally relieved of service and being relieved on condition subsequent.

In either event, it was the function of the local board to classify the registrant. Thus, for example, a minister of religion was exempt from service and was classified IV–D (Reg. 622.44); a person employed in an essential occupation was deferred and was classified II–A (Reg. 622.21). To make either classification, the board necessarily had need for the true facts. Certainly, nothing which inheres in the word "liable" requires the conclusion that Congress did not intend to proscribe the making of a false statement to a local board where the purpose of the registrant was to obtain a deferred classification. And nothing is suggested showing that Congress intended not to strike at falsity of the kind here involved.

It is said that Congress used the word "liable" in other parts of the Act in the narrower sense and that a broader construction should not be given it in Section 11. But Congress also provided for deferments (Sec. 5, 50 U. S. C. App. 305). And it is unreasonable to believe that Congress did not intend to extend the enforcement provisions to this category as well as the other. The legislative history of Section 11 shows no

more than that it was a substantial reenactment of the enforcement provisions of the Selective Draft Act of 1917 (50 U. S. C. App. 201 et seq.). See *Singer* v. *United States,* 323 U. S. 338, 342, 348. Section 6 of that act proscribed the making of a false statement as to liability for service, and this was held to include a false statement made for the purpose of delaying, on grounds of dependency, the time when the registrant would be selected for service. *Kreibich* v. *United States,* 261 Fed. 168 (C. C. A. 8). The same kind of statements are involved in these cases. It is true that there are variations between the predecessor statute and the 1940 act, but the significant feature for us is the fact that the word "liable" was broad enough in the earlier act to reach statements like petitioners' and there is nothing to suggest that Congress intended to use it in a narrower sense in the later act. There is a *casus omissus* in Section 11, as petitioners contend, only if one is read into the all-embracive language used in that provision. Construction of an important provision of an important statute does not require that the narrowest possible meaning be given to words which reasonably may be accorded a meaning more consistent with the obvious purpose of Congress. Even criminal statutes "should be given their fair meaning in accord with the evident intent of Congress." *United States* v. *Sullivan,* No. 121, decided January 19, 1948.

2. Petitioners also contend (No. 647, Pet. 6, 8, 23; No. 648, Pet. 4, 6, 16–21) that the statements in the form 42A signed by Foster, to the effect that the successful operation of the business of the Panhandle companies depended on Rubinstein's continued employment and that it was impossible to replace him without seriously impairing the drilling program—the statements specifically charged as false in counts 2 and 3—were merely statements of opinion, and hence that a prosecution for making false statements could not be based thereon. The question thus raised is largely of academic interest, since, as the court below pointed out (R. 2235), petitioners were guilty of making false representations of fact as well as of opinion. The statement that, "because of the character" of Rubinstein's functions, the success of the business depended upon his continuing employment, obviously referred to the statement of duties set forth in the prior portion of the affidavit (see Statement, *supra*, p. 6). These were clearly false statements of fact as to the "character" of Rubinstein's functions which were carried over into the statement alleged in the indictment.

In any event, the decision below is clearly correct in holding that petitioners' statements of opinion were false statements as to liability for service under the act. As this Court stated in *Seven Cases* v. *United States*, 239 U. S. 510, 517:

> state of mind is itself a fact, and may be a material fact, and false and fraudulent representations may be made about it * * *.

Even in the civil law of fraud, the assertion in bad faith of a belief or opinion not honestly entertained under circumstances which would justify reliance on such opinion constitutes fraud. *Shell Oil Co.* v. *State Tire & Oil Co.*, 126 F. 2d 971, 974 (C. C. A. 6); *Keeler* v. *Fred T. Ley & Co.*, 65 F. 2d 499, 501 (C. C. A. 1); *Vulcan Metals Co.* v. *Simmons Mfg. Co.*, 248 Fed. 853, 856 (C. C. A. 2), certiorari denied, 247 U. S. 507; *Goodrich-Lockhart Co.* v. *Sears*, 270 Fed. 971, 977 (E. D. Ky.).

The same rule, we submit, must necessarily apply under Section 11 of the Selective Service and Training Act. Statements as to liability for service in many cases necessarily involved matters of opinion. Many claims for occupational deferment depended on opinions. Even medical judgments are opinions based upon observable facts. There is, of course, a vast difference between an honest error of judgment and an opinion deliberately advanced in bad faith without any honest belief therein. Manifestly, Congress must have intended that persons making statements to a draft board, necessarily involving matters of opinion, must have done so in good faith.

No conflict of decisions is involved here. The case of *Chaplin* v. *United States*, 157 F. 2d 697 (App. D. C.), upon which petitioners rely, involved a prosecution for false pretenses, a com-

mon law offense which the court held was limited by its history. The practical considerations which the court thought gave rise to the common law limitations and which the court deemed of sufficient importance to justify the continuance of the common law rule, have no application to the situation presented by the Selective Service and Training Act. Under that Act, as we have shown, statements of opinion were an integral part of the system created by Congress. As the cases cited by petitioners themselves show (see No. 647, Pet. 21–22), with respect to other offenses where false representations of state of mind would tend to subvert the purpose which the statute was designed to achieve, prosecutions based on false representations of state of mind have regularly been upheld. *Durland* v. *United States*, 161 U. S. 306; *United States* v. *Uram*, 148 F. 2d 187 (C. C. A. 2), certiorari denied *sub nom. Sohmer* v. *United States*, 325 U. S. 875.

3. The contentions that the proof was insufficient to support the verdicts (No. 647, Pet. 6, 9, 27–28; No. 648, Pet. 5, 6, 22–26) are sufficiently answered by the summary of the evidence set forth in the Statement, *supra*. In fact, the bits of evidence which petitioners have gleaned from the record to show some activity by Rubinstein in behalf of Panhandle companies (No. 648, Pet. 23–26) show that Foster could not in good faith have deemed Rubinstein necessary to the drilling operations and other activities of those companies.

As to counts 4 and 5, it is clear that Rubinstein's alleged employment by Taylorcraft was a last-minute scheme concocted in a desperate effort to avoid liability for service.

4. Petitioners further contend (No. 647, Pet. 6, 9, 26; No. 648, Pet. 4, 6, 21–22) that the trial court committed prejudicial error in failing to instruct the jury that they could not base a conviction upon a finding that the Panhandle companies were not wholly engaged in war work, as stated in the form 42A on which counts 2 and 3 were based. They admit that such evidence was properly admitted on the question of intent, but argue that the verdict of the jury might have been based on such false statements rather than on the specific statements alleged in the indictment.

At the opening of his charge, the trial judge read the indictment to the jury, including, of course, the specific allegations set forth in the various counts (R. 2163–2170). He told the jury that such were the charges to which the defendants had pleaded not guilty, and that the plea of not guilty put in issue every material allegation of the charge (R. 2170). A little later (R. 2172), he charged the jury that as to counts 2 and 4—

> It is for you to determine whether the statements of the defendants were knowingly false and to determine further whether they were material and made with

> criminal intent, that is, knowingly. If you believe that they were made honestly, then you must acquit; if you find beyond a reasonable doubt that they are false and that the defendants or any of them knew they were false, you must convict. To put it another way, it is a crime to make such statements to a Selective Service Board, knowing such statements to be false. * * *

The instruction obviously referred to the statements charged in the indictment as false, and the jury must so have understood.

Having told the jury what they must find, the judge was not required to tell them what they did not have to find. Since he did not review the evidence in the case, there was no necessity for him to go into the evidentiary details, such as the false statements respecting the extent of the war work of the Panhandle companies.

5. Rubinstein also contends (No. 647, Pet. 6, 23–25) that since counts 2 and 4 were based on employers' affidavits, he could have committed the offenses only if he acted in concert with the employers, and hence that he could not also be convicted of conspiracy to commit such offenses.[3] He relies on the rule that if an executed substantive crime necessarily involves mutual cooperation of two or more persons, such persons may not be convicted of conspiracy on the basis of the same concert of action. *United States* v. *Zeuli*, 137 F.

[3] This contention affects only the fines, since the imprisonment sentences are to be served concurrently.

2d 845 (C. C. A. 2); see *Pinkerton* v. *United States*, 328 U. S. 640; *United States* v. *Katz*, 271 U. S. 354. The doctrine of those cases is, however, limited to situations where concert of action is itself a necessary element of the substantive offense. That factor is not present here. Concert of action is not an element of the offense of making false statements as to liability for service under the Selective Training and Service Act. The employer, alone, could make false statements. A registrant, alone, could under some circumstances, cause an innocent employer to make a false statement. The mere fact that the proof in this case established guilty participation by the employer and the registrant is not sufficient to take the case out of the general rule that conspiracy to commit a crime and the crime itself are separate offenses. *United States* v. *Bayer*, 331 U. S. 532; *Pinkerton* v. *United States*, 328 U. S. 640.

CONCLUSION

We respectfully submit that the petitions for writs of certiorari should be denied.

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